IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
December 16, 2008 Session

STATE OF TENNESSEE v. JOSEPH L. JOHNSON, JR.

Appeal from the Criminal Court for Davidson County
No. 2004-A-273 Steve Dozier, Judge

No. M2007-01644-CCA-R3-CD - Filed August 18, 2009

A Davidson County jury found the defendant, Joseph L. Johnson, Jr., guilty of two counts of aggravated robbery, Class B felonies, one count of aggravated assault, a Class C felony, and one count of felony evading arrest, a Class D felony. One of the defendant's aggravated robbery counts was modified, based on double jeopardy concerns, to a conviction for aggravated assault. The trial court sentenced the defendant to twenty-eight years as a Range III, persistent offender for the aggravated robbery conviction. On the other counts, the trial court sentenced the defendant as a Range II, multiple offender as follows: eight years for one of the two aggravated assault convictions; ten years for the other aggravated assault conviction; and eight years for the evading arrest conviction. The trial court ordered that the sentences be served consecutively, resulting in an effective term of fifty-four years. On appeal, the defendant argues that: (1) the evidence produced at trial was insufficient to support his convictions; (2) the trial court erred by failing to instruct the jury on reckless aggravated assault as a lesser included offense of aggravated assault; (3) the trial court erred by instructing the jury on felony reckless endangerment as a lesser included offense of aggravated assault; (4) the trial court imposed excessive sentences for his individual offenses; and (5) the trial court improperly imposed consecutive sentences. After reviewing the record, we conclude that the trial court erred in instructing the jury on reckless endangerment as a lesser included offense of aggravated assault, but because the defendant was convicted of the indicted offense, that error was harmless. Discerning no other error, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JERRY L. SMITH and ALAN E. GLENN, JJ., joined.

J. David Wicker, Jr., Nashville, Tennessee (at motion for new trial and on appeal); and Paul J. Walwyn, Madison, Tennessee (at trial), for the appellant, Joseph L. Johnson, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Victor S. (Torry) Johnson, III, District Attorney General; and Pamela S. Anderson and Amy Eisenbeck, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

The record reflects that the Davidson County Grand Jury returned a sixteen-count indictment which alleged that the defendant and a co-defendant, Willie Harris, committed several offenses between October 27 and November 17, 2003. Those counts of the indictment relating to the November 17, 2003 robbery of a Nashville Taco Bell were severed from the other offenses and renumbered for trial purposes. In Counts 1 and 2, the co-defendants were charged with aggravated robbery against Sam Alshinawa (Count 1) and Ebony Moore[1] (Count 2). Count 3 charged defendant Johnson with aggravated assault against a Nashville police officer during a car chase following the robbery, Count 4 charged Johnson with felony evading arrest, and Count 5 charged Harris with felony evading arrest. The co-defendants, who were represented by separate counsel, were tried jointly before a Davidson County jury, although Harris is not subject to this appeal.[2]

At trial, Sadek "Sam" Alshinawa testified that on November 17, 2003, he was the manager at a Taco Bell restaurant on Brick Church Pike in Nashville. Approximately ten minutes after the store opened at 10:00 that morning, Ebony Moore, who was working the register in the dining area, came into the office, where Alshinawa was working, and told him that "somebody is try[ing] to rob us." He and Moore then went to the dining area, where he saw a man, whom he identified as the defendant, jump onto the counter. Alshinawa said that the defendant wore a "dark maroon" jacket with a hood covering his head. Moore telephoned the police and Alshinawa pushed a button to activate a silent alarm.

Alshinawa said that once the defendant got onto the counter, the defendant grabbed Moore's hair with his left hand while keeping his right hand in his pocket. Alshinawa testified that the defendant's right pocket appeared "heavy," as if a gun were in the pocket, and that the defendant did not remove his right hand from his pocket during the incident. Alshinawa said that during the incident he felt frightened and that Moore cried and told him, "Please help me." He said that at one point the defendant, who kept his hand inside the pocket with his index finger out and the thumb up, told him, "If you don't give me the money, I will hurt her." Alshinawa gave the defendant the money from the store safe, and Moore opened the cash register and gave him the money from the register. He said that the store usually kept around $600 on hand and that the defendant took approximately $200 to $300, some of which was in $5 and $1 bills. The defendant also demanded the store's

[1] The spellings of Mr. Alshinawa's last name and Ms. Moore's first name differ between the indictment and the trial transcript. In this opinion we will use the spellings that appear in the indictment.

[2] Because this appeal concerns only defendant Johnson, Harris will hereinafter be referenced by his last name while Johnson will be referenced as "the defendant."

surveillance videotape; Alshinawa said that the store did not have a working surveillance system but that he gave the defendant a training video.

After the manager gave the defendant the video, the defendant "grab[bed] [Moore by] her hair, again. He hit her in the wall. . . . I believe she hit . . . her head . . . ." After the defendant pushed Moore into the wall, he ran out the restaurant's front door. Alshinawa ran out the back door, carrying a metal object of some sort. He saw the defendant get into the driver's seat of a "goldish or silver" car in which another man wearing a brown jacket was seated in the front passenger seat. Alshinawa used the metal object to bust out three of the car's windows. The car sped off as the police arrived. Later that day, the police returned to the store with the defendant. Alshinawa told the police that he was sure that the defendant was the person who robbed the store; he testified that he and the defendant shoved each other at one point during the robbery and that he saw the defendant's face at that point. Alshinawa said that he was "100% certain" the man whom he saw in the car's passenger seat the day of the robbery was Willie Harris, the co-defendant at trial.

On cross-examination, Alshinawa said that the defendant kept his right hand in his pocket from the time he came into the store until the time he left. He said that he put the money inside the defendant's jacket pocket after being told to do so by the defendant. However, Alshinawa did not specify into which pocket he placed the money. He reiterated that the defendant's right jacket pocket looked like it contained "something heavy" and that there was "no way" the pocket could have been empty.

Several members of the Metropolitan Nashville Police Department testified regarding their involvement in this case. Officer Ben Ward, the first officer to testify, said that he arrived at the Taco Bell just as a silver Pontiac backed out of a parking space in the restaurant's parking lot. Officer Ward then saw Alshinawa leave the restaurant and bust out the car's windows before the car sped from the parking lot and drove onto Brick Church Pike. Officer Ward then chased the Pontiac in his police cruiser. The Pontiac led police through both business areas and residential neighborhoods; Officer Ward said that the defendant's car reached speeds of eighty miles per hour on straight stretches of highway in the business areas and sixty-five miles per hour in the residential areas. He said that during the chase, two separate police officers used their police cruisers to set up roadblocks at two different locations. Each time, the defendant narrowly missed hitting the police cruiser. Officer Ward also noted that the chase occurred during "the middle of the day and there [were] a lot of people out, people outside in the parking lot, [and there was a] lot of pedestrian traffic on the sidewalks as well."

Eventually, the car slid into a yard near the corner of McFerrin Avenue and Carter Street, in a residential area. The defendant and Harris left the car and ran in opposite directions. Officer Ward pursued and caught Harris while the other officers who had joined in the chase followed the defendant. Officer Ward said that Harris had "a little over two hundred dollars" in "[t]wenties, tens and fives" in his possession when arrested; Harris was not, however, carrying a gun when arrested.

Officer Byron Carter testified that he also arrived at the Taco Bell as the defendant's "silver vehicle" exited the parking lot. Officer Carter then joined the police chase of the defendant's car,

with Officer Ward's cruiser being the first car behind the defendant and Officer Carter following Officer Ward. Like Officer Ward, Officer Carter also testified that the defendant's car far exceeded the speed limit during the chase; the officer said that his own car reached speeds of sixty-five miles per hour on the commercial roads and forty-five to fifty miles per hour on the residential streets. On cross-examination, Officer Carter said that when the defendant's car first left the Taco Bell there were no pedestrians near the restaurant and there was only "light" vehicle traffic.

Officer Michael Windsor testified that when he arrived in the vicinity of the Taco Bell, he saw the defendant's car exit the store's parking lot at a high rate of speed, with Officer Ward following him. Officer Windsor, who saw the defendant heading south on Brick Church Pike, pulled his police cruiser across the southbound lanes of Brick Church in an attempt to block the defendant's car. Officer Windsor, who did not get out of his car, saw the defendant's car approach his police car at a high rate of speed before it swerved onto the sidewalk, avoiding the police cruiser. He noted that the defendant's actions "put me in fear of my life and safety." Officer Windsor did not join the chase after the defendant passed him.

Officer Byron Agoston testified that he joined the chase of the defendant's car near the corner of Lischey Avenue and Cleveland Street. After a while, the defendant's car came to a stop in a house's yard and the car's driver (the defendant) and passenger fled in opposite directions. Officer Agoston followed the defendant, who initially ran down the sidewalk, in his police car; when the defendant ran "into a grassy area [and] down into a creek," the officer left his car and followed the defendant on foot. The officer followed the defendant through the creek for "[p]robably between fifty and seventy yards" before the defendant left the creek and fell onto the ground. Officer Agoston then arrested the defendant. The officer found forty-two dollars in cash in the defendant's pants pocket; he did not remember what the defendant was wearing at his arrest.

Officer Gary Clements testified that on the day of this incident he was near the intersection of McFerrin Avenue and Carter Street, where the chase ultimately ended, when he received a call about the police chase involving the defendant's car. He saw the defendant's car heading eastbound on Douglas Avenue, so he pulled his police car across Douglas in an attempt to block the defendant. The defendant's car approached the officer's car at a high rate of speed; Officer Clements thought that the defendant was going to hit him, but the defendant "dodged around to the rear of [the officer's] car and . . . went on by." After the defendant's car passed, Officer Clements pulled forward to let the pursuing police cars pass him before joining the chase himself. When the defendant's car came to a stop, Officer Clements followed Harris, the passenger. Officer Clements drove through a house's yard and pulled his car into an alley, trapping Harris, who was arrested by Officer Ward. Officer Clements later went into a creek near the arrest site and found money, a cellular phone, and a driver's license and Social Security card belonging to defendant Johnson. Specifically, Officer Clements said that the officers recovered money in two separate "piles." He did not know how much money the officers recovered from the creek.

Detective Norris Tarkington testified that by the time he arrived at the house where the defendant's car stopped, the defendant and Harris had already been arrested. He said that the police found a Taco Bell videocassette, broken glass, some crumpled five dollar bills, and a blue hooded

sweatshirt from the defendant's car. He said that when the defendant was caught, he was wearing a maroon hooded sweatshirt. Detective Tarkington brought the defendant and Harris back to the Taco Bell, and Alshinawa said that these two men were the ones whom he had encountered at the restaurant that morning.

The defendant testified that the morning of the incident, he and his fiancée drove to Vanderbilt University, where she was an instructor, in her Pontiac Grand Am. After the defendant dropped off his fiancée, he went to a house on Douglas Avenue to "shoot dice" and "get high." After staying at the house a while, he and Harris, who was also at the house, went to Taco Bell to get food. The defendant said that he was the only customer in the store at that point. He said that once he got inside the store, he noticed that nobody was working the front counter, so he "hollered 'hey'" and waited there for five to ten minutes. He "kind of laid on the counter a little bit" because he was "under the influence;" after a while, Alshinawa "kind of shoved my head," which prompted the defendant to jump over the counter. The two men "started talking back and forth," which in turn escalated to "scuffling." According to the defendant, during the confrontation the defendant kept "seeing [Alshinawa] give [Moore] this eye contact as if to get something . . . ." After a while, the defendant left the store.

As the defendant headed toward his car, he heard police sirens and saw Alshinawa approach his car with a metal pipe in his hand. The defendant told Alshinawa not to swing the pipe at him, but Alshinawa knocked out the rear window and passenger-side windows with the pipe. The defendant claimed that Alshinawa then screamed, "Is this what you want?" and threw a videocassette into the car. The defendant said that he then "[took] off" when he saw the police, who began chasing his car. He said that another police car "kind of swerved" in front of him and he ran off the side of the road to avoid it. He said that he did not stop when the police chased him because he "was kind of panicked, scared . . . [and] high on drugs," and because he did not want to go to jail. The defendant said that after he was arrested, one of the officers took fifty-four dollars out of his (the defendant's) pocket and kept it. He said that Detective Tarkington took him back to the Taco Bell, where Alshinawa identified him. The defendant repeatedly told police that he did not rob anyone and did not have a weapon on him. He also claimed that one of the officers acknowledged to him that he never saw the defendant throw anything out of the car because "he was behind me the whole time."

The defendant said that he did not have a weapon with him and that Alshinawa did not place any money into his pocket during the incident. He said that during the incident he wore a two-piece nylon suit with brown dress shoes, and he also wore a burgundy jacket with a hood on it. He claimed that he did not wear the hood on his head when he went into the restaurant.

On cross-examination, the defendant acknowledged that he smoked marijuana and crack cocaine, used powder cocaine, and drank a twenty-two ounce can of beer at the Douglas Avenue house before going to the Taco Bell. He also denied keeping his hand in his pocket the entire time he was in the store. The defendant gave conflicting testimony regarding Officer Windsor's car; at one point, the defendant denied almost hitting him rather, instead saying that Officer Windsor "was already parked slanted . . . I just went around him." He said that Officer Windsor did not drive

toward him and that the officer gave him sufficient room for him to drive around the police car without incident. He added, "I know better than to hit a police car." At another point, he said that he did not remember a police car setting a roadblock soon after leaving Taco Bell and that the only car that tried to block him was on Douglas Avenue. The defendant also denied throwing anything from his pockets. He said that his wallet and the money the police found in the creek could have fallen out of his pocket when he fell into the creek.

After deliberating, the jury found the defendant guilty as charged on all applicable counts of the indictment. The trial court subsequently held separate sentencing hearings, at the end of which the trial court took each defendant's sentence under advisement. In a written order, the trial court, citing in part to this court's opinion in State v. Franklin, 130 S.W.3d 789, 796 (Tenn. Crim. App. 2003), found, "Although there were . . . two employees who were witnesses to the robbery, there was only one taking for double jeopardy purposes." (emphasis in original). Accordingly, it reduced the jury's guilty verdict in Count 2 (aggravated robbery conviction against victim Moore) to a conviction for aggravated assault. The defendant filed a timely motion for new trial; after a two-year delay, the defendant filed an amended motion, which the trial court denied. The defendant subsequently filed a timely notice of appeal.

ANALYSIS

I: Sufficiency of Evidence

The defendant first argues that the evidence produced at trial was insufficient to support any of his felony convictions. An appellate court's standard of review when the defendant questions the sufficiency of the evidence on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original). The appellate court does not reweigh the evidence; rather, it presumes that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions regarding witness credibility, conflicts in testimony, and the weight and value to be given to evidence were resolved by the jury. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). A guilty verdict removes the presumption of innocence and replaces it with a presumption of guilt, and on appeal the defendant has the burden of illustrating why the evidence is insufficient to support the jury's verdict. Id.; State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This standard applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Pendergrass, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

Defendant's Convictions for Offenses Involving Victims Inside Restaurant

The defendant was convicted of one count of aggravated robbery against victim Alshinawa and one count of aggravated assault against victim Moore. Aggravated robbery is "[a]ccomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon[.]" Tenn. Code Ann. § 39-13-402(a)(1)-(2) (2003). Robbery is

defined as "the intentional or knowing theft of property from the person of another by violence or putting the person in fear." Id. § 39-13-401(a). "A person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner's effective consent." Id. § 39-14-103.

As relevant to this case, "A person commits assault who . . . [i]ntentionally or knowingly causes another to reasonably fear imminent bodily injury[.]" Tenn. Code Ann. § 39-13-101(a)(2). Aggravated assault is defined in pertinent part as assault where the defendant uses or displays a deadly weapon. Id. § 39-13-102(a)(1)(B).

In this case, the defendant does not challenge the sufficiency of the evidence as it relates to most of the elements of these two offenses. The defendant's sole argument relating to these two offenses is that the evidence is insufficient to establish beyond a reasonable doubt that he "used or displayed a deadly weapon or used or fashioned any article to lead a victim to 'reasonably believe' that he had a deadly weapon." In support of his argument, the defendant states that Alshinawa "claimed that he 'thought' the [defendant] had a gun or . . . 'figured' [the defendant] had a gun, but [he] never once stated that [the defendant] ever used or displayed a gun." He also notes that the police did not locate a gun after the incident. The State argues that the evidence established that Alshinawa reasonably believed that the defendant was armed and would use it if he and Moore did not comply with the defendant's demands, and as such, the evidence was sufficient to establish the "use or display of a weapon" element of these offenses.

This court has considered several aggravated robbery cases where a defendant did not display a weapon but kept his hand in his pocket throughout the incident. This court thoroughly reviewed the issue in State v. Monoleto D. Green, No. M2003-02774-CCA-R3-CD, 2005 WL 1046800 (Tenn. Crim. App. May 5, 2005). In that opinion, after reviewing several previous cases, we noted that "the common threads running through all of the . . . cases on this issue are: 1) a hand concealed in an article of clothing; and 2) a threat—express or implied—that caused the victim to 'reasonably believe' the offender had a deadly weapon and was not opposed to using it." Id. at *10. We also noted that "Tennessee law does not require the prosecution to prove a defendant made 'gestures' while his hand was in a pocket, or that he 'shaped' his hand in a manner that resembled a weapon before the elements of aggravated robbery are satisfied." Id. at *9.

In most of the cases where we have upheld a defendant's conviction in an armed robbery case involving a "hand in pocket," the defendant made either an explicit reference to having a gun or a threat to shoot or kill a victim, or both. See, generally, State v. Michael V. Morris, No. M2006-02738-CCA-R3-CD, 2008 WL 544567, at *6 (Tenn. Crim. App. Feb. 25, 2008) app. denied (Tenn. Aug. 25, 2008) (defendant told store clerk, "do you see this pistol," and threatened to shoot him); Monoleto D. Green, 2005 WL 1046800, at *10 (defendant gave victims in several motel robberies notes saying, "I have a gun" and "Don't make me use it."); State v. Lawrenzo Menton, No. W2002-00267-CCA-R3-CD, 2003 WL 21644936, at *1 (Tenn. Crim. App. July 2, 2003) (defendant told victims, "This is a holdup and I have a gun."); State v. Melvin L. Harper, No. E2001-01089-CCA-R3-CD, 2002 WL 31777647, at *4 (Tenn. Crim. App. Dec. 12, 2002) (defendant told convenience store clerk to "open the drawer or I'll kill you"). However, this court has also affirmed convictions

in cases similar to this one where the assailant did not mention having a gun and made generalized threats to harm his victim rather than threats to shoot or kill his victim.

In State v. Frederick Corlew, No. M2001-00842-CCA-R3-CD, 2002 WL 31478266, at *1 (Tenn. Crim. App. Nov. 1, 2002), the defendant entered and exited a convenience store on five different occasions within thirty minutes of the robbery; the sixth time, he went behind the counter with one hand in his pocket and demanded that the store clerk open the cash register. The defendant kept his right hand in his right pocket while taking money out of the cash register with his left hand. Id. The defendant dropped money onto the floor but kept his right hand in his pocket. Id. Regarding the defendant's right hand, the victim testified that she "'didn't know whether it was a gun or knife, but it appeared to be some type of weapon.' The victim further testified that the defendant had something 'bulky enough that [she] thought it was some type of weapon.'" Id. The defendant then led the victim to a back room where he pulled his pants down and forced the victim to perform oral sex on him. Id. During this episode, the defendant pulled his right hand out of his pocket, revealing that he was not carrying a gun. Id. After removing his hand from his pocket, he threatened to kill her. Id. This court concluded that the evidence was sufficient to convict the defendant of aggravated robbery, noting that the defendant had, "during his previous entries into the store . . . exhibited both hands but, as he was robbing the victim, purposely kept his right hand in his pocket, even though it caused him to drop bills onto the floor." Id. at *3. We also noted that the defendant's "posture made it appear that he had something in his right pocket. . . . [W]e cannot conclude that the victim's belief that he had a deadly weapon was unreasonable." Id.

In State v. Aaron Cooper, No. 01C01-9708-CR-00368, 1998 WL 668263, at *1 (Tenn. Crim. App. Sept. 30, 1998), the defendant entered a woman's car and told her "Give it to me. . . . Don't make me have to hurt you. I know you got it." The driver testified that the defendant "had his hand in the waistband of his jogging pants, as if he had a weapon of some kind." Id. The defendant searched the woman's car for money while keeping his hand in his pants. Id. The defendant ultimately found the woman's wallet and left the car. Id. The driver testified that the defendant "kept his hand in the waistband of his pants until he jumped out of her car." Id. This court affirmed the defendant's conviction, emphasizing that during the entire time the defendant was in the victim's car, he "held his hand in the waistband of his pants 'as if he had a weapon of some kind[.]'" Id. at *4.

The facts of this case are similar to those of Frederick Corlew and Aaron Cooper. Like the defendants in those cases, this defendant kept his hand concealed in his right pocket throughout the incident inside the Taco Bell. Like the store clerk in Frederick Corlew, Alshinawa testified that the defendant's right pocket appeared "heavy" as if it held a weapon. Alshinawa placed money in the defendant's jacket pocket (after the defendant ordered him to do so) while the defendant kept his right hand in his pocket and held Moore's hair in his left hand—a peculiar instance similar to that in Frederick Corlew, where the defendant kept his right hand in his pocket despite dropping money onto the floor while taking it from the cash register. Finally, as was the case in Aaron Cooper, the defendant did not threaten to shoot or kill Moore or Alshinawa; he threatened only to "hurt" Moore if the store employees did not give him money. Accordingly, we conclude that the evidence produced at trial was sufficient to establish that the Taco Bell employees reasonably believed that

the defendant had a deadly weapon and was not opposed to using it, thus establishing the "use or display of a deadly weapon" element of aggravated robbery and aggravated assault.

The other elements of the offenses were clearly met. Alshinawa testified that the defendant, keeping his right hand in his pocket throughout the incident, jumped onto the store counter, demanded money, and threatened to harm Moore if he did not get the store's money. The defendant then went behind the counter and continued his demands. Ultimately, the defendant took money from the store's register and Alshinawa placed money from the store's safe in the defendant's jacket pocket. During the incident the defendant grabbed Moore by the hair and slammed her head into the wall, and the defendant and Alshinawa also got into a physical altercation before the defendant left the restaurant. Alshinawa testified that he felt frightened during the incident, and while Moore did not testify, her fear could be inferred from Alshinawa's testimony that she cried and begged Alshinawa for help during the incident. See State v. Dotson, 254 S.W.3d 378, 395-96 (Tenn. 2008) (where placing victim in fear is an element of the offense, victim's being placed in fear may be inferred from the circumstances surrounding the offense). Accordingly, we conclude that the evidence was sufficient to convict the defendant of aggravated robbery against victim Alshinawa and aggravated assault against victim Moore.

Aggravated Assault Against Officer Windsor

The defendant was also convicted of committing aggravated assault against Officer Windsor. See Tenn. Code Ann. §§ 39-13-101(a)(2), 39-13-102(a)(1)(B) (defining aggravated assault as intentionally or knowingly causing the victim to reasonably fear imminent bodily injury through the use or display of a deadly weapon). In this case, the evidence established that shortly after the defendant sped out of the Taco Bell parking lot, Officer Windsor positioned his police cruiser across the highway in an attempt to stop him. The defendant did not slow down or stop; rather, he sped toward Officer Windsor's car at a high rate of speed, swerving just before hitting the officer. Officer Windsor testified that the defendant's actions put him in fear of his safety.

The defendant, citing to this court's opinion in State v. Tate, 912 S.W.2d 785, 787 (Tenn. Crim. App. 1995), acknowledges that "[a] motor vehicle can constitute a deadly weapon within the meaning of the [statute] . . . ." However, he argues that the other two elements of the offense cannot be met. The defendant writes in his brief:

> Officer Windsor positioned his car . . . so that [the defendant] would either have to slow down or pass his car by driving on the sidewalk. This is exactly what happened . . . . [The defendant] explained that he knew better than to hit a police vehicle and as a result, he just drove around the vehicle of Officer Windsor to avoid hitting it. Officer Windsor cannot be said to have reasonably feared for his safety nor can it be found that [the defendant] knowingly or intentionally used his vehicle to cause Officer Windsor to fear bodily injury.

(internal citations omitted). However, this court has held that the offense of aggravated assault contains both "nature of conduct" and "result of conduct" elements. See State v. Szumanski Stroud,

No. W2006-01945-CCA-R3-CD, 2007 WL 3171158, at *5 (Tenn. Crim. App. Oct. 29, 2007) (victim's being placed in fear is a "result of conduct" element, while displaying a deadly weapon is a "nature of conduct" element), app. denied (Tenn. May 5, 2008). Thus, the defendant's claim that he did not intend to hit Officer Windsor's car or place the officer in fear is of little consequence. Rather, the proof needed to establish that the defendant was reasonably certain that his actions would cause the officer to fear bodily injury. See Tenn. Code Ann. § 39-11-106(a)(20) ("A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result."). Given that the defendant drove toward the officer's car at a high rate of speed and that the officer testified to being afraid when he saw the defendant's car speeding toward him, this "result of conduct" element was clearly met in this case. Concluding that the evidence was sufficient to sustain the defendant's conviction for aggravated assault against Officer Windsor, we deny the defendant relief.

Felony Evading Arrest

"It is unlawful for any person, while operating a motor vehicle on any street, road, alley or highway in this state, to intentionally flee or attempt to elude any law enforcement officer, after having received any signal from the officer to bring the vehicle to a stop." Tenn. Code Ann. § 39-16-603(b)(1) (2003). A violation of this statute is a Class D felony when "the flight or attempt to elude creates a risk of death or injury to innocent bystanders or other third parties." Id. § (b)(3). In this case, the evidence clearly established that the defendant left the Taco Bell parking lot and led several police officers, whose cars had their lights and sirens activated, on a high-speed chase through streets in both commercial districts and residential neighborhoods. However, the defendant argues that the evidence was insufficient to convict him of Class D felony evading arrest with risk to others because "there was no evidence presented by the State that [the defendant] created any risk of death or injury to innocent bystanders on a public road, alley, or highway." The State disagrees.

In support of his contention, the defendant cites to an unpublished opinion of this court, State v. Prentice C. Calloway, No. M2004-01118-CCA-R3-CD, 2005 WL 1307800 (Tenn. Crim. App. June 2, 2005). In that case, the defendant, Calloway, after noticing that he was being followed by a police car, made an "abrupt right turn" into a store parking lot. 2005 WL 1307800, at *2. The officer then activated his lights and sirens, which led Calloway to drive through the parking lot, into a playground, and across a city street before entering a field across from the playground. Id. at *3. The officer who chased Calloway testified that several children were present in the playground and that several persons in the field ran away from the defendant's vehicle. Id. This court reversed Calloway's conviction, concluding that while Calloway endangered persons in the field and on the playground, Calloway endangered nobody while he drove across the city street, as is required under the statute to elevate the offense to a Class D felony. Id. at *5.

The facts of this case, however, are not comparable to those in Prentice C. Calloway. Unlike Calloway, the defendant in the instant case drove exclusively on city streets after leaving the Taco Bell parking lot. Officer Carter testified that while traffic was "light" on the morning of the chase, other cars were on the road during the chase. Additionally, Officer Ward testified that he saw pedestrians walking down the sidewalk during the chase. The Tennessee Supreme Court has held

that proof establishing that other motorists were on the street or that pedestrians were walking along a sidewalk during a chase is sufficient to sustain a conviction for Class D felony evading arrest with risk to others. See State v. Turner, 193 S.W.3d 522, 525 (Tenn. 2006); State v. Payne, 7. S.W.3d 25, 28-29 (Tenn. 1999). Accordingly, we conclude that the evidence produced at trial was sufficient to convict the defendant of felony evading arrest.

II: Jury Instructions Regarding Lesser Included Offenses of Aggravated Assault

The defendant next argues that the trial court erred in instructing the jury of lesser included offenses on Count 3 of the indictment, which charged the defendant with aggravated assault against Officer Windsor. The defendant contends that the trial court erred by failing to instruct the jury on reckless aggravated assault as a lesser included offense, and he also argues that the trial court erred by instructing the jury on felony reckless endangerment as a lesser included offense.

Jury Instruction on Reckless Aggravated Assault

The defendant did not specifically request a reckless aggravated assault jury instruction. Tennessee Code Annotated section 40-18-110 "places a duty on the defendant to request a lesser-included offense in writing at trial" to preserve the issue on appeal. State v. Page, 184 S.W.3d 223, 229 (Tenn. 2006); see Tenn. Code Ann. § 40-18-110(b) and (c). Tennessee Code Annotated section 40-18-110 provides, in pertinent part:

> (b) In the absence of a written request from a party specifically identifying the particular lesser included offense or offenses on which a jury instruction is sought, the trial judge may charge the jury on any lesser included offense or offenses, but no party shall be entitled to any such charge.
>
> (c) Notwithstanding any other provision of law to the contrary, when the defendant fails to request the instruction of a lesser included offense as required by this section, such instruction is waived. Absent a written request, the failure of a trial judge to instruct the jury on any lesser included offense may not be presented as a ground for relief either in a motion for new trial or on appeal.

"[I]f a defendant fails to request an instruction on a lesser-included offense in writing at trial, the issue will be waived for purposes of plenary appellate review and cannot be cited as error in a motion for new trial or on appeal." Page, 184 S.W.3d at 229. Therefore, we conclude that the issue regarding the reckless aggravated assault jury instruction is waived.

However, our supreme court also made clear that when a jury instruction is waived for failure to request it in writing, an appellate court may still review the issue for plain error. Id. at 230. "When necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of an accused at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal." Tenn. R. App. P. 36(b). In determining whether plain error review is appropriate, the following factors must be established:

(a) The record . . . clearly establish[es] what occurred in the trial court;
(b) a clear and unequivocal rule of law [has] been breached;
(c) a substantial right of the accused [has] been adversely affected;
(d) the accused did not waive the issue for tactical reasons; and
(e) consideration of the error is "necessary to do substantial justice."

State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). On appeal, the defendant has the burden of establishing that these five factors are met. State v. Gomez, 239 S.W.3d 733, 737 (Tenn. 2007) ("Gomez II") (citing State v. Bledsoe, 226 S.W.3d 349, 355 (Tenn. 2007)). The appellate court need not consider all five factors if any single factor indicates that relief is not warranted. Smith, 24 S.W.3d at 283.

In this case, the first plain error factor is clearly met, as the trial court's jury instructions and the parties' conference regarding the jury instructions were transcribed by the court reporter. We begin our determination of whether a clear and unequivocal rule of law has been breached by reviewing the standard established in State v. Burns, 6 S.W.3d 453 (Tenn. 1999), for determining what constitutes a lesser included offense:

> An offense is a lesser-included offense if:
>
> > (a) all of its statutory elements are included within the statutory elements of the offense charged; or
> >
> > (b) it fails to meet the definition in part (a) only in the respect that it contains a statutory element or elements establishing
> >
> > > (1) a different mental state indicating a lesser kind of culpability; and/or
> > >
> > > (2) a less serious harm or risk of harm to the same person, property or public interest; or
> >
> > (c) it consists of
> >
> > > (1) facilitation of the offense charged or of an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or
> > >
> > > (2) an attempt to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or
> > >
> > > (3) solicitation to commit the offense charged or an offense that otherwise meets the definition of

lesser-included offense in part (a) or (b).

Burns, 6 S.W.3d at 466-67.

If an offense is a lesser included offense, then the trial court must conduct the following two-step analysis in order to determine if the lesser included offense instruction should be given:

> First, the trial court must determine whether any evidence exists that reasonable minds could accept as to the lesser-included offense. In making this determination, the trial court must view the evidence liberally in the light most favorable to the existence of the lesser-included offense without making any judgments on the credibility of such evidence. Second, the trial court must determine if the evidence, viewed in this light, is legally sufficient to support a conviction for the lesser-included offense.

Id. at 469. "A defendant need not demonstrate a basis for acquittal on the greater offense to be entitled to an instruction on the lesser offense." State v. Allen, 69 S.W.3d 181, 187 (Tenn. 2002) (citing State v. Bowles, 52 S.W.3d 69, 75 (Tenn. 2001)). "The trial court must provide an instruction on a lesser-included offense supported by the evidence even if such instruction is not consistent with the theory of the State or of the defense. The evidence, not the theories of the parties, controls whether an instruction is required." Allen, 69 S.W.3d at 187-88. If a trial court improperly omits a lesser included offense instruction, then constitutional harmless error analysis applies, and this court must determine if the error did not affect the outcome of the trial beyond a reasonable doubt. State v. Ely, 48 S.W.3d 710, 725 (Tenn. 2001).

In this case, the indictment charging the defendant with aggravated assault against Officer Windsor alleged that the defendant "intentionally or knowingly did cause Michael Windsor to reasonably fear imminent bodily injury, and [the defendant] did use or display a deadly weapon . . ." (emphasis added). Pursuant to our criminal code, a person commits reckless aggravated assault when the person "[r]ecklessly commits an assault as defined in § 39-13-101(a)(1), and: (A) [c]auses serious bodily injury to another; or (B) [u]ses or displays a deadly weapon." Tenn. Code Ann. § 39-13-102(a)(2). Our supreme court has held:

> [R]eckless aggravated assault cannot be a lesser-included offense of aggravated assault based on knowingly or recklessly causing another to reasonably fear imminent bodily injury because, while the mens rea of recklessly causing may be a lesser mens rea of acting intentionally or knowingly, reckless aggravated assault requires an element that is not found in the charged offense—bodily injury.

State v. Goodwin, 143 S.W.3d 771, 776 (Tenn. 2004) (emphasis added); see also id. at 776 n.4 ("Reckless aggravated assault is a lesser-included offense of aggravated assault if the aggravated assault was charged under Tennessee Code Annotated section 39-13-101(a)(1), intentionally or knowingly causing bodily injury to another."). Because the defendant was not entitled to a jury

instruction on reckless aggravated assault, we conclude that the trial court's refusing to give the instruction did not violate a clear and unequivocal rule of law—and therefore did not constitute plain error. The defendant is denied relief on this issue.

Jury Instruction on Reckless Endangerment

The defendant also argues that the trial court erred by instructing the jury on felony reckless endangerment as a lesser included offense of aggravated assault. The State argues that the defendant has waived the issue by failing to object to the jury instruction at trial. However, this argument is misplaced. While a defendant must object to an omitted jury instruction to preserve the issue on appeal, the Tennessee Supreme Court, interpreting Rule 30(b) of the Tennessee Rules of Criminal Procedure in a case involving a defendant who did not object at trial to what he perceived to be an erroneous lesser included offense instruction, has held that a defendant's right to challenge an erroneous jury instruction is not waived by his failure to make an objection at trial. State v. Lynn, 924 S.W.2d 892, 898-99 (Tenn. 1996). See also Tenn. R. Crim. P. 30(b) ("Counsel's failure to object does not prejudice the right of a party to assign the basis of the objection as error in a motion for new trial."). The defendant may still raise the issue in a motion for new trial. Lynn, 924 S.W.2d at 899. In this case, the defendant challenged the trial court's reckless endangerment jury instruction in his motion for new trial, so the issue was properly preserved. Accordingly, we will consider the issue on its merits.

Tennessee's reckless endangerment statute provides, "A person commits an offense who recklessly engages in conduct that places or may place another person in imminent danger of death or serious bodily injury." Tenn. Code Ann. § 39-13-103(a). In State v. Moore, 77 S.W.3d 132, 136 (Tenn. 2002), the Tennessee Supreme Court held that "felony reckless endangerment is not a lesser-included offense of aggravated assault committed by intentionally or knowingly causing another to reasonably fear imminent bodily injury by use or display of a deadly weapon." The most pertinent part of the court's Burns analysis reads as follows:

> Application of part (b)(2) to the risk of danger element requires an evaluation of the degree or risk of harm required for each offense at issue. From an analysis of the statutory requirements of aggravated assault, we determine that the presence of danger is not an essential element of aggravated assault committed by placing another person in fear of imminent danger of death or serious bodily injury. Consequently, one can commit the offense of aggravated assault by placing another person in fear of danger even if there is no risk of danger. The same does not hold true for felony reckless endangerment. It logically follows that the danger produced during the commission of felony reckless endangerment produces a more serious harm or risk of harm than the fear of a non-existent danger that may be produced during the commission of aggravated assault; therefore, part (b)(2) of the Burns test is not satisfied.

Id. at 135-36 (footnote omitted). Accordingly, we conclude that the trial court erred by instructing the jury on reckless endangerment as a lesser included offense of aggravated assault under the theory

of causing Officer Windsor to fear imminent bodily injury.

We must next determine whether this non-structural constitutional error can be considered harmless beyond a reasonable doubt. Non-structural constitutional errors may only be considered harmless when the State can prove "'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Allen, 69 S.W.3d at 190 (quoting Neder v. United States, 527 U.S. 1, 15 (1999)); see also State v. Rodriguez, 254 S.W.3d 361, 371 (Tenn. 2008). In this case, the State argues that the trial court's error "did not contribute to the verdict obtained"—a guilty verdict of the indicted offense of aggravated assault—because the trial court's sequential jury instructions essentially precluded the jury from considering the improperly-given charge.

The record reflects that at the beginning of its instruction, the trial court informed the jury that "Count Three of the Indictment in this case charges the Defendant . . . with the offense of Aggravated Assault. This offense embraces the lesser included offense[s], Reckless Endangerment and Assault." The trial court then instructed the jury; when the trial court instructed the jury on Count Three of the indictment, it first instructed the jury as to the indicted offense of aggravated assault before instructing the jury on reckless endangerment. After instructing the jury on the offenses listed in the five counts of the indictment, the trial court issued the following instruction:

> When you begin your deliberations on each count of the Indictment, you must first deliberate on the indicted or charged offense—offenses.
>
> If you find the Defendant guilty of the indicted offense, you may stop your deliberations as to the remaining charges within that count of the indictment.
>
> If you find the Defendant not guilty of the indicted offense or you have a reasonable doubt, then you must find the Defendant not guilty of the indicted offense and next consider the lesser-included offenses, as set out in your Verdict Form.
>
> You must first deliberate on the greater offense and reach a verdict as to the greater offense, before you move on tho the next lesser-included offense within that particular count.
>
> If you reach a verdict as to the guilt of the Defendant as to a greater offense, you may stop your deliberations as to that particular count.

Unlike in Moore, where the jury found the defendant not guilty of the indicted offense of aggravated assault under the theory of causing the victim to fear serious bodily injury and convicted him of the improperly-charged lesser included offense of reckless endangerment, 77 S.W.3d at 133, the jury here convicted the defendant of aggravated assault as charged in the indictment. The jury, if it followed the trial court's instructions, as presumed, never considered the improperly-charged lesser included offense. We also note that our supreme court has held that sequential jury instructions do not deprive the defendant of his constitutional right to a jury trial. See State v. Davis, 266 S.W.3d 896, 905 (Tenn. 2008). The reckless endangerment jury instruction did not prejudice

the defendant and did not contribute to his conviction on the indicted offense. We therefore conclude that the trial court's error was harmless and deny the defendant relief on this issue.

III: Sentencing

The defendant's final contention on appeal is that the trial court imposed sentences that violated his right to a jury trial as guaranteed by the Sixth Amendment. The defendant's assertions concern both his sentences on his individual convictions, where he argues that the trial court relied upon sentence enhancement factors that were not found by the jury beyond a reasonable doubt, and the trial court's imposition of consecutive sentences. The State argues that the defendant's sentences did not violate his Sixth Amendment rights. After reviewing the record, we agree with the State.

Defendant's Individual Sentences

At the defendant's sentencing hearing, the State introduced certified copies of the defendant's judgments of conviction in four prior felony cases. Although these judgments do not appear in the record, we can determine the defendant's prior convictions from the sentencing hearing testimony and the presentence report. In 2002 the defendant was convicted in Davidson County of one count of robbery, a Class C felony. In 1996, the defendant was convicted of two counts of aggravated robbery, both Class B felonies. Finally, in 1994 the defendant was convicted of the federal offense of bank robbery accomplished with a deadly weapon, which the trial court considered a Class B felony for sentencing purposes. The trial court determined that the defendant would be sentenced as a Range III, persistent offender, for his conviction on one count of aggravated robbery, a Class B felony. See Tenn. Code Ann. § 40-35-107(a)(2) (when defendant is convicted of Class A or Class B felony, defendant may be sentenced as Range III offender if he has "any combination of three (3) Class A or Class B felony convictions[.]"). For the defendant's convictions for aggravated assault, a Class C felony, and evading arrest, a Class D felony, he was sentenced as a Range II, multiple offender. See id. § 40-35-106(a)(1) (defendant may be sentenced as a Range II offender if he has "[a] minimum of two (2) but not more than four (4) prior felony convictions within the conviction class, a higher class, or within the next two (2) lower felony classes, where applicable."). The defendant does not challenge the trial court's determination of sentencing ranges on appeal.

In its written sentencing order, the trial court applied one enhancement factor: "The defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range[.]" Tenn. Code Ann. § 40-35-114(2) (2003) (amended 2005). In addition to finding that the defendant's 2002 Class C felony robbery conviction would serve to enhance his aggravated robbery conviction and that the defendant "would have at least two (2) qualifying additional conviction for enhancement purposes" as to the other offenses, the trial court found that application of this enhancement factor was appropriate because the defendant "admitted at the sentencing hearing to drug usage spanning over twenty (20) years." The trial court found that other enhancement factors were inapplicable based upon the Supreme Court's opinion in Blakely v. Washington, 542 U.S. 296, 303 (2004). Regarding mitigating factors, the trial court stated that it "considered all factors listed in Section 40-35-113 of the Tennessee Code . . . [but] did not find mitigating factors that apply in this case."

The trial court sentenced the defendant to twenty-eight years as a Range III, persistent offender for his aggravated robbery conviction. See Tenn. Code Ann. § 40-35-112(c)(2) (sentence range for defendant convicted of Class B felony and sentenced as Range III offender is twenty to thirty years). For the defendant's two convictions for Class C felony aggravated assault, the trial court sentenced the defendant as a Range II, multiple offender to ten years for the offense involving Officer Windsor and eight years for the offense involving Taco Bell employee Moore. See id. § 40-35-112(b)(3) (sentence range of six to ten years). Finally, the trial court sentenced the defendant as a Range II offender to eight years for his class D felony evading arrest conviction. See id. § 40-35-112(b)(4) (sentence range of four to eight years). The trial court ordered the defendant to serve all sentences consecutively, resulting in an effective sentence of fifty-four years.

An appellate court's review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d) (2003) (amended 2005).[3] As the Sentencing Commission Comments to this section note, on appeal the burden is on the defendant to show that the sentence is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, the court may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

However, "the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In this respect, for the purpose of meaningful appellate review,

> [T]he trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. Tenn. Code Ann. § 40-35-210(f) (1990).

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994).

Under the law as it existed before the 2005 amendment, unless enhancement factors were present, the presumptive sentence to be imposed was the minimum in the range for a Class B, C, D, or E felony. Tenn. Code Ann. § 40-35-210(c) (2003). Tennessee's pre-2005 sentencing act provided that, procedurally, the trial court was to increase the sentence within the range based on the existence of enhancement factors and, then, reduce the sentence as appropriate for any mitigating factors. Id.

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[3] We note that on June 7, 2005, the General Assembly amended Tennessee Code Annotated sections 40-35-102(6), -114, -210, -401. See 2005 Tenn. Pub. Acts ch. 353, §§ 1, 5, 6, 8. However, the amended code sections are inapplicable to the defendant's appeal because the defendant's offense occurred prior to the enactment of the revised sentencing act and the defendant elected to be sentenced pursuant to the sentencing act as it existed at the time of his offense.

§ 40-35-210(d), (e). The weight to be afforded an existing factor was left to the trial court's discretion so long as it complied with the purposes and principles of the 1989 Sentencing Act and the court's findings were adequately supported by the record. Id. § 40-35-210, Sentencing Commission Comments; State v. Moss, 727 S.W.2d 229, 237 (Tenn. 1986); see Ashby, 823 S.W.2d at 169.

While the court can weigh the enhancement factors as it chooses, the court may only apply the factors if they are "appropriate for the offense" and "not themselves essential elements of the offense." Tenn. Code Ann. § 40-35-114 (2003). Our supreme court has stated that "[t]he purpose of the limitations is to avoid enhancing the length of sentences based on factors the Legislature took into consideration when establishing the range of punishment for the offense." State v. Poole, 945 S.W.2d 93, 98 (Tenn. 1997).

In conducting its de novo review, the appellate court must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210 (2006); see Ashby, 823 S.W.2d at 168; Moss, 727 S.W.2d at 236-37.

The defendant correctly notes that in 2007, our supreme court held that "to the extent the [former sentencing act] permitted enhancement based on judicially determined facts other than the fact of a prior conviction, it violated the Sixth Amendment as interpreted by the Supreme Court." Gomez II, 239 S.W.3d at 740 (citations omitted). In light of this conclusion, the defendant argues that the trial court's basing its application of the "criminal history" enhancement factor on the defendant's admitting to a history of drug use was inappropriate in that the enhancement factor was based upon something other than a prior conviction. However, the United States Supreme Court has held that the defendant's Sixth Amendment right to a jury trial is not offended when the defendant's sentence is enhanced based on facts admitted by the defendant. See Blakely v. Washington, 542 U.S. 296, 303 (2004) ("Our precedents make clear . . . that the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.") (citation omitted; emphasis in original); Cunningham v. California, 549 U.S. 270, 275 (2007).

We note that the trial court improperly found that the defendant admitted to a twenty-year history of drug use at the sentencing hearing. Rather, the defendant made this statement within the context of his presentence report. Statements made by the defendant as part of a presentence investigation are "made outside the confines of any judicial proceeding and thus do not qualify as admission for purposes of the Sixth Amendment." State v. Charles Vantilburg, III, No. W2006-02475-CCA-R3-CD, 2008 WL 382765, at *9 (Tenn. Crim. App. Feb. 12, 2008), perm. app. denied, (Tenn. Aug. 25, 2008). However, at the sentencing hearing the defendant did admit that he hid his "drug habits" from his parents and at trial he said that he did not tell his fiancée about his cocaine habit, an admission which supports the trial court's application of the "criminal history" enhancement factor. Additionally, the trial court correctly found in the sentencing hearing that the

defendant had a "previous history of criminal convictions . . . in addition to those necessary to establish the appropriate range." Concluding that the trial court's enhancement of the defendant's sentences based upon the "criminal history" enhancement factor was proper, we affirm the sentences imposed for each of the defendant's offenses.

Consecutive Sentencing

Consecutive sentencing is guided by Tennessee Code Annotated section 40-35-115(b), which states in pertinent part that the trial court may order sentences to run consecutively if it finds by a preponderance of the evidence that "[t]he defendant is an offender whose record of criminal activity is extensive" or "is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high." Tenn. Code Ann. § 40-35-115(b)(2), (4) (2006). When imposing consecutive sentences based on the defendant's status as a dangerous offender, the trial court must, "in addition to the application of general principles of sentencing," find "that an extended sentence is necessary to protect the public against further criminal conduct by the defendant and that the consecutive sentences must reasonably relate to the severity of the offenses committed." State v. Wilkerson, 905 S.W.2d 933, 939 (Tenn. 1995). In all cases where consecutive sentences are imposed, the trial court is required to "specifically recite [on the record] the reasons" behind imposition of consecutive sentences. See Tenn. R. Crim. P. 32(c)(1); see, e.g., State v. Palmer, 10 S.W.3d 638, 647-48 (Tenn. Crim. App. 1999) (noting the requirements of Rule 32(c)(1) for purposes of consecutive sentencing).

In ordering that the defendant serve all of his sentences consecutively, resulting in a total effective sentence of fifty-four years, the trial court found:

> [T]he defendant's record of criminal activity is extensive. The defendant has multiple violent felony convictions for the same type offenses which led to the convictions in this case. The defendant has served prison sentences and probation and neither type punishment has deterred the defendant. Additionally, the Court finds the defendant to be a dangerous offender who indicated little or no regard for human life and no hesitation about committing a crime in which the risk to human life was high. The Court does find that the effective sentence is necessary to, in this case, protect the public and the separate sentences relate to the severity of the offenses. Each of these offenses involved distinct crimes and victims (or potential victims) and should result in separate punishments.

The defendant argues that the trial court's imposition of consecutive sentences was improper because the trial court's order essentially restated the statutory language regarding the "dangerous offender" factor without making appropriate findings. However, the sentencing order reflects that the trial court did apply the two required Wilkerson factors. Furthermore, the trial court's imposition of consecutive sentences based upon the defendant's extensive record of criminal activity was supported by the record, and only one factor is needed for the trial court to act within its discretion to impose consecutive sentences. See Tenn. Code Ann. § 40-35-115, Sentencing Comm'n Cmts.

The defendant also argues that the trial court's imposition of consecutive sentences violates his Sixth Amendment right to a jury trial. However, the Tennessee Supreme Court has held that our statutory scheme, in which the trial court may impose consecutive sentences if it determines that certain statutory factors are established in the record by a preponderance of the evidence, does not offend a defendant's right to a jury trial under the Sixth and Fourteenth Amendments. See State v. Allen, 259 S.W.3d 671, 688-90 (Tenn. 2008); see also Oregon v. Ice, ___ U.S. ___, 129 S. Ct. 711, 714-15 (2009) (holding that the Sixth Amendment does not preclude a trial judge from finding facts necessary to impose consecutive sentences). Accordingly, we affirm the trial court's imposition of consecutive sentences.

CONCLUSION

Upon consideration of the foregoing and the record as a whole, the judgments of the trial court are affirmed.

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D. KELLY THOMAS, JR., JUDGE